Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas		WC Docket No. 06-172
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas		WC Docket No. 07-97

REPLY COMMENTS OF BROADVIEW NETWORKS, INC., COVAD COMMUNICATIONS COMPANY, NUVOX AND XO COMMUNICATIONS, LLC

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REPLY COMMENTS

Broadview Networks, Inc., Covad Communications Company, NuVox, and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), by their attorneys, hereby file their reply comments in response to the Order issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceedings on September 18, 2009.[1]

I. SUMMARY

In their initial comments, a number of interested parties echoed the Commenters' point that, in many locations, non-incumbent carriers continue to be dependent on incumbent local exchange carrier ("ILEC") unbundled network elements ("UNEs") to provide narrowband

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1 *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas; Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, WC Docket Nos. 06-172, 07-97, Public Notice, DA 09-2083 (rel. Sept. 18, 2009) ("*Sept. 18th Order*").

and broadband services to their end user business customers. They agreed that the premature elimination of Section 251(c)(3) unbundling obligations though the Section 10 forbearance process would have a significant negative impact on non-incumbent carriers' continued ability to provide these end user services. A recently released draft report by the Berkman Center for Internet and Society at Harvard University confirms the importance of unbundling to the deployment of first generation and next generation broadband services.

The forbearance framework suggested by the Commenters in initial comments would provide the Commission and industry participants with a comprehensive roadmap for the conduct of UNE forbearance proceedings. Specifically, the Commenters encourage the Commission to embrace the market power analysis employed by the Commission in a variety of proceedings over the past twenty years to determine when forbearance from UNE obligations is appropriate. This proposed framework should result in forbearance being granted only in situations where the consequences would not be a diminution in narrowband or broadband competition.

This proposed market power analysis, which requires a robust assessment of the competitive environment in the product and geographic markets at issue, was endorsed by a variety of commenting parties. They agreed that focusing on whether the petitioning carrier possesses market power is the most appropriate means to ensure that the substantive requirements of Section 10 are met before forbearance from UNE unbundling obligations is granted.

II. THE IMPORTANCE OF UNBUNDLING TO THE DEPLOYMENT OF BROADBAND SERVICES IS WELL ESTABLISHED

In initial comments, the Commenters pointed out that today they are using UNEs to provide a variety of creative broadband services to small, medium, and large businesses.[2] The Commenters stated further that the premature elimination of UNE obligations could seriously impede their ability to continue to offer these broadband (and other business) services. COMPTEL confirmed these points in its initial comments. COMPTEL noted:

> Competitors use unbundled loops and transport to provide broadband service to end users and need access to those wholesale inputs to provide competitive service. The Commission must ensure that a faulty forbearance analysis does not frustrate the right of consumers to competition among network providers, application and service providers, and content providers that both the Commission and Congress have formally acknowledged and recognized.[3]

A recently released draft report by the Berkman Center for Internet and Society at Harvard University confirms the importance of unbundling to the deployment of first generation and next generation broadband services.[4] The *Berkman Study*, which reviewed "the current plans and practices pursued by other countries in the transition to the next generation of connectivity, as well as their past experience"[5] found that:

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2 *See* Comments of Broadview Networks, Inc., *et al.*, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Broadview, et al. Comments*"), at 9-10.

3 Comments of COMPTEL, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*COMPTEL Comments*"), at 14.

4 Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world, Berkman Center for Internet and Society at Harvard University (Draft, Oct. 2009) ("*Berkman Study*"), *available at* http://www.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf. The Commission recently issued a Public Notice inviting comment on the *Berkman Study*. *See Comments Sought on Broadband Study Conducted by the Berkman Center for Internet and Society*, NBP Public Notice #13, DA 09-2217 (rel. Oct. 14, 2009).

5 *Id.*, at 9.

> "open access" policies – unbundling, bitstream, access, collocation requirements, wholesaling, and/or functional separation – are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition.[6]

The *Berkman Study* discovered that open access, which requires incumbents "to make available to their competitors, usually at regulated rates, the most expensive, and in the case of local loop and shared access, lowest-tech elements of their networks,"[7] enables non-incumbents to compete through investment in the more technology-sensitive and innovative elements of the network. Regulated access, the *Study* found, "provides one important pathway to make telecommunications markets more competitive than they could be if they rely solely on competition among the necessarily smaller number of companies that can fully replicate each other's infrastructure."[8]

The *Study* directly attributed the United States' status as a middle-of-the-pack performer on most first generation broadband measures[9] to the fact that the Commission, between the fall of 2001 and the spring of 2002, "passed a series of decisions that abandoned the effort to implement open access and shifted the focus of American policy from the idea of regulated competition within each wire – competition over the copper plant of the telephone company and over the coaxial cable of the cable company – to competition between the owners

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6 *Id.*, at 11.

7 *Id.*, at 77.

8 *Id.*

9 The attributes benchmarked by the *Berkman Study* are penetration, capacity, and price. *Id.*, at 9-10.

of the two wires."[10] The *Study* concluded that the weight of the evidence supports the conclusion that "the original judgment made by Congress in the Telecommunications Act of 1996 represented the better course ... Open access policies, where seriously implemented by an engaged regulator, contribute[ ] to a more competitive market and better outcomes."[11] In sum, the *Study* noted that the "most surprising findings [of the *Study*] to an American seeped in the current debate in the United States are the near consensus outside the United States on the value and importance of access regulation, [and] the strength of the evidence supporting that consensus ..."[12]

III. THE *OMAHA* STANDARD DOES NOT MEET THE REQUIREMENTS OF SECTION 10 AND SHOULD BE RETIRED

The Section 251(c)(3) forbearance standard developed in the *Omaha Forbearance Order*[13] and employed to judge subsequent UNE forbearance petitions centered on the location and extent of retail residential competition from a single facilities-based (*i.e.*, competitive loop-based) competitor coupled with the Commission's predictive judgment that the ILEC would continue to make just and reasonable wholesale last-mile offerings available to all competitors.[14] However, as shown in the Commenters initial comments – and the initial comments of numerous others – this framework for assessing requests for forbearance from Section 251(c)(3)

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10 *Id.*, at 82.

11 *Id.*, at 83.

12 *Id.*, at 77.

13 *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*") *aff'd Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

14 *Omaha Forbearance Order*, at ¶¶ 61-62, 67.

unbundling obligations falls far short of meeting the requirements of Section 10 in a number of important respects.[15]

Critical among the material shortcomings of the *Omaha* standard is the failure to require a product market-specific UNE forbearance analysis. While the Commission in *Omaha* generally acknowledged the importance of identifying the relevant product markets to be reviewed, its conclusions regarding forbearance from UNE unbundling rules were not grounded in a product market-specific analysis.[16] As pointed out by COMPTEL, the Commission's unexplained unwillingness to formally define product markets for purposes of its UNE forbearance review "has led to absurd results."[17] COMPTEL noted that "Qwest was relieved of the obligation to provide unbundled access to DS1 and DS3 transport and last mile loops – products not purchased by or used to serve the retail mass market – because the Commission determined that there was sufficient competition in the retail mass market."[18] COMPTEL agreed with the Commenters that "[t]he Commission cannot perform a meaningful analysis of market share for purposes of determining the competitiveness of a market without first defining the relevant product markets."[19]

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15 *See Broadview, et al. Comments*, at 10-21.

16 *Id.*, at n.129.

17 *COMPTEL Comments*, at 18.

18 *Id.*

19 *Id.* COMPTEL's concerns were echoed in the initial joint comments of Covad Communications Company, *et al.* *See* Comments of Covad Communications Group, Alpheus Communications, *et al.*, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Covad, et al. Comments*"), at 19 ("The Commission's competition analysis in the *Omaha Forbearance Order* failed to take separate residential and business markets into account ... Thus, it could have granted forbearance for UNEs used in business markets even if *no* business locations were actually served by the facilities based cable provider.) (emphasis in original). *See also* Comments of Cbeyond, *et al.*, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Cbeyond, et al. Comments*"), at 9.

Another material shortcoming of the *Omaha* standard is its reliance on the activities of a single facilities-based retail competitor.[20] Numerous commenters discussed the Commission's failure in *Omaha* to recognize the "dangers of duopoly ... where only one viable competitor to the incumbent is providing facilities-based competition using its own last mile facilities and where there is no serious prospect of additional facilities-based entry."[21] PAETEC offered the actual experience of its subsidiary, McLeodUSA, in the Omaha Metropolitan Statistical Area ("MSA") post-forbearance as a cautionary tale for why the Commission, going-forward, must certify the existence of multiple facilities-based competitors in a particular product market before considering whether to grant forbearance from UNE obligations.

> McLeodUSA, previously the largest facilities-based CLEC operating in pre-forbearance Omaha, ceased selling services to new customers and continues the costly process of exiting from the Omaha market due to the *Omaha Forbearance Order*. This withdrawal from Omaha was directly caused by the absence of any enforceable unbundling rule which deprived competitors of reasonable access to the loop facilities that are essential to competition.[22]

The recently-released *Berkman Study* confirms the negative consequences for competition that comes from reliance on an ILEC/cable duopoly.[23] The *Berkman Report* surveyed broadband usage and deployment throughout the world and found:

> The highest prices for the lowest speeds are overwhelmingly offered by firms in the United States and Canada, all of which inhibit markets structured around

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20 *See Omaha Forbearance Order*, at ¶ 59.

21 Comments of PAETEC Holding Corp., WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*PAETEC Comments*"), at 6-7. *See also* Joint Comments of the Massachusetts Office of the Attorney General and the Massachusetts Department of Telecommunications and Cable, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Massachusetts AG, et al. Comments*"), at 13-17.

22 *PAETEC Comments*, at 9.

23 *Berkman Study*, at 12.

> "inter-modal" competition – that is, competition between one incumbent owning a telephone system, and one incumbent owning a cable system. The lowest prices and highest speeds are almost all offered by firms in markets where, in addition to an incumbent telephone company and a cable company, there are also competitors who entered the market, and built their presence, through use of open access facilities.[24]

The evidence thus is clear that the presence of the ILEC and a single competitor is not sufficient to ensure that the benefits of narrowband or broadband competition are realized.

Commenters also noted that the Commission in *Omaha* failed to adequately consider the role of facilities-based wholesale services in its UNE forbearance analysis. Since the Section 251(c)(3) unbundling obligation applies to the wholesale services provided by ILECs, the Commission's analysis necessarily must separately consider the effects that a grant of forbearance would have on consumers of those wholesale services (*i.e.*, competitive carriers) as well as the consumers of retail services offered using those inputs. As explained in the Cbeyond, *et al.* comments:

> Wholesale customers seek access to network elements that they can combine with their own networks in order to provide finished services to end user customers. The "products" at issue are therefore stand-alone loop and transport facilities and the wholesale operations support systems that are necessary to make them available. In contrast, retail customers demand finished retail services for which network elements are merely inputs. Given that wholesale network elements and retail services could not possibly be viewed as substitutes, the two types of service must be analyzed separately.[25]

COMPTEL suggested one approach to ensure that the Commission properly considers the wholesale market. COMPTEL proposed that the Commission adopt a rule that would require

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24 *Id.*

25 *Cbeyond, et al. Comments*, at 16.

continued enforcement of Section 251(c)(3) unbundling obligations unless there are at least two wholesale providers in addition to the ILEC that offer transport and last mile access over their own facilities capable of serving 100% of the end users in the geographic market for which forbearance is sought.[26]

Not surprisingly, the only party in its initial comments to argue in support of the Commission's *Omaha* standard was Qwest – the beneficiary of partial UNE forbearance in the Omaha MSA. Qwest contended that the *Omaha* standard "is the approach that best reflects the goal of promoting competition that underscores both Section 10 and the Act itself."[27] Yet Qwest failed to mention – let alone rebut – any of the shortcomings of the *Omaha* standard identified by others well before the filing of initial comments in these remand dockets. Moreover, Qwest completely ignored the practical results of application of the *Omaha* standard as evidenced by the withdrawal of McLeodUSA from the Omaha MSA and the unwillingness of other competitive carriers to enter that geographic market.

IV. THE COMMISSION'S UNE FORBEARANCE STANDARD SHOULD BE BASED ON AN ASSESSMENT OF WHETHER THE PETITIONING CARRIER POSSESSES MARKET POWER

In initial comments, the Commenters proposed that the Commission adopt a market power approach to UNE forbearance requests.[28] This approach requires a comprehensive assessment of the state of competition in the individual product and geographic markets at issue. A market power-based analysis necessarily includes consideration of the petitioning carrier's market share but the review does not stop there. Other factors, such as the number of facilities-based carriers present in a market and the extent to which the carrier under review controls

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26 *COMPTEL Comments*, at 20.

27 Comments of Qwest Corporation, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Qwest Comments*"), at 10 (footnote omitted).

28 *Broadview, et al. Comments*, at 22-36.

bottleneck facilities, may have a profound influence on whether a carrier with a particular market share possesses market power.[29] The Commenters maintain that focusing on whether the petitioning carrier possesses market power is the most appropriate means to ensure that the substantive requirements of Section 10 are met before forbearance from UNE unbundling obligations is granted.

Various other interested parties agree with the Commenters that the Commission should adopt a market power standard to assess UNE forbearance requests. PAETEC wrote that because Section 10 requires the Commission to assess whether the petitioning carrier's rates can be assured to be just, reasonable and non-discriminatory if forbearance were granted, "it is logical for the Commission to employ a market power analysis to determine whether unbundling remains warranted."[30] PAETEC added that the D.C. Circuit's decision in *Verizon v. FCC* leaves intact the Commission's discretion to incorporate a market power assessment in its UNE forbearance analysis.[31] The Arizona Corporation Commission likewise endorsed a market power-focused analysis, stating that it supports the consideration of "traditional indicators of 'market power' in addition to a per se market share test."[32] And Covad, *et al.* echoed these views, adding that although the Commission found in *Omaha* "that it was not necessary to use its traditional market dominance analytical framework in evaluating UNE forbearance, the failed Omaha experiment proves that a more nuanced analysis that focuses on specific product and geographic markets is warranted ..."[33]

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29 *Id.*, at 34.

30 *PAETEC Comments*, at 25-26.

31 *Id.*, at 26.

32 Initial Comments of the Arizona Corporation Commission, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*ACC Comments*"), at 9.

33 *Covad, et al. Comments*, at 23. *See also Cbeyond et al. Comments*, at 20-32.

As the Commenters explained in their initial comments, the determination of whether a particular carrier possesses market power hinges on a comprehensive assessment of the state of competition in the individual product and geographic markets at issue.[34] Importantly, although it is not the only relevant factor, the petitioning carrier's actual market share is a critical component of this competitive analysis. The parties filing initial comments expressed near unanimity on this point.[35]

Although AT&T, Qwest, and Verizon strongly disagreed that a UNE forbearance standard that focuses on market power is appropriate,[36] even they conceded that actual competition is an essential component of the Commission's UNE forbearance analysis. Verizon summarized its position as follows:

> Regardless of whether the Commission is applying the forbearance criteria or the impairment standard, the Commission must consider both actual and potential competition, and both intermodal and intramodal competitors. Consistent precedent from the Supreme Court and the D.C. Circuit – which the D.C. Circuit did not disturb in *Verizon* – compels that conclusion in the context

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34 *See Broadview et al. Comments*, at 31-36.

35 *See ACC Comments*, at 1 ("[T]he Arizona Commission believes that 'actual competition' should continue to be an important part of the Federal Communications Commission's ('FCC') evaluation of forbearance requests in the future."); *Cbeyond et al. Comments*, at 9 ("[I]t is critical that that FCC deny forbearance unless the incumbent LEC faces a sufficient level of actual competition in a relevant market to discipline the rates, terms and conditions under which the incumbent LEC offers service."); *COMPTEL Comments*, at 16-17 (emphasis in original) ("At a minimum, the Commission should not grant an ILEC forbearance ...unless the ILEC has a retail market share of less than 50% *and* faces significant competition from more than one wholesale provider ..."); *Massachusetts AG, et al. Comments*, at 10 (emphasis in original) ("[T]he Commission took a step in the right direction when it issued the *Verizon 6 MSA Forbearance Order* by moving away from its 'Coverage Threshold Test' (potential competition) and focusing, instead, solely on **actual competition** in the wireline voice marketplace."); *PAETEC Comments*, at 33 ("[T]he market-dominance approach described herein should give more weight to actual competition than to potential competition").

36 *See, e.g., Qwest Comments*, at 11.

> of the impairment standard. The same is true in the forbearance context.[37]

AT&T concurred, stating that "[c]ourts, antitrust authorities, and competition-policy scholarship ... uniformly hold that policymakers must take both actual and potential competition into account in determining the proper level of government intervention in the marketplace."[38] Even Qwest admitted that the level of actual competition in a given market is relevant to the Commission's analysis. Although Qwest urged the Commission to "return to the approach it utilized in the *Omaha Forbearance Order* in order to craft a forbearance standard that aligns with the goals of the Act",[39] it conceded elsewhere that the *Omaha* approach "evaluated both existing competition and the potential for future competition."[40]

V. SECTION 10 AND SECTION 251 ARE SEPARATE PROVISIONS OF THE ACT WITH DIFFERENT STANDARDS AND GOALS

Verizon, in its initial comments, made several suggestions that are out-of-bounds and should be summarily rejected by the Commission. Verizon contended that in these remand dockets "the Commission should establish a clear process for conforming its unbundling rules to current marketplace developments, consistent with the Commission's long-standing recognition that UNE requirements should be 'lifted as soon as competition eliminates the need for them.'"[41] According to Verizon, the Commission should adopt "some process to bring its UNE rules into

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37 Comments of Verizon, WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*Verizon Comments*"), at 2-3.

38 Comments of AT&T Inc., WC Docket Nos. 06-172, 07-97 (filed Sept. 21, 2009) ("*AT&T Comments*"), at 1.

39 *Qwest Comments*, at 21.

40 *Id.*, at 6.

41 *Verizon Comments*, at 2.

compliance with current market realities and to comply with the statutory impairment standard."[42]

Verizon's suggestions represent further administration of the Section 251 impairment standard and are outside of the legitimate scope and purpose of the remand proceedings. The *Verizon* and *Qwest* remand dockets are being conducted because the Commission failed to adequately explain the basis for the Section 10 forbearance standard it employed in the *Verizon 6-MSA Order*. The D.C. Circuit remanded the proceeding "so that the Commission can 'examine the relevant data and articulate a satisfactory explanation for its action.'"[43] The Commission's job here is to adopt a standard of analysis for requests for forbearance from Section 251(c)(3) obligations *that implements the requirements of Section 10* – not to revisit the Section 251(c)(3) impairment standard. Verizon fails to recognize that Section 10 and Section 251(c)(3) operate independently and have different statutory requirements, purposes, and goals.

Verizon is attempting to achieve the same result here that it failed to achieve in its appeal of the *Verizon 6-MSA Order*. Verizon argued before the D.C. Circuit that the test the Commission applied in the *Verizon 6-MSA Order* was improper because it contravenes Section 251 of the Act.[44] In rejecting that argument, the Court reminded Verizon that "the dispute before [the] court ... concerns whether the statutory text of § 10 – not § 251 – contradicts the FCC's interpretation."[45] The Court held that "Verizon's argument fails because it unnecessarily

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42 *Id.*

43 *Verizon v. FCC*, No. 08-1012, Slip Op. (D.C. Cir. Jun. 19, 2009), at 19.

44 *Id.*, at 10.

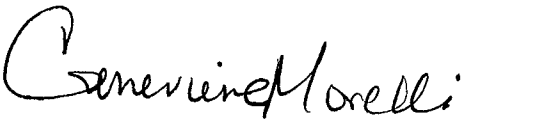
45 *Id.*, at 11.

conflates the FCC's impairment standard with the forbearance standard under § 10."[46] The Commission should follow the D.C. Circuit's lead and dismiss Verizon's inappropriate suggestions here. The Commission instead should focus its efforts on developing a standard that fully and faithfully implements the statutory prerequisites to forbearance contained in Section 10.

VI. CONCLUSION

For all of the reasons contained herein and in the Commenters' initial comments, the Commission should adopt the proposed approach to petitions seeking forbearance from Section 251(c)(3) unbundling obligations contained in the Commenters' initial comments in these dockets.

Respectfully submitted,

By: 

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46 *Id.*